IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.H-01-3624
	)	(Consolidated)
ENRON CORP., et al.,	)	
	)	
Defendants,	)	

Certain Officer Defendants' Revised Opposition to Enron Task Force's Revised Motion for a Limited Stay of Selected Depositions

Certain former officers of Enron ("Officer Defendants")[1] file this opposition to the United States' Revised Motion for a Limited Stay of Selected Depositions (filed June 30, 2004).

1. Preliminary Statement

Whether the Enron Task Force should receive an indefinite stay of civil discovery depositions of its choosing has now been briefed by the Task Force three times.[2] The Task Force's latest motion adds nothing of substance to the unavailing arguments in its prior motions. The depositions taken

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[1] The Officer Defendants joining in this opposition include: Richard B. Buy, Richard A. Causey, Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Jeffrey K. Skilling, Joseph Sutton, and Lawrence Greg Whalley. The Officer Defendants understand that the Outside Directors represented by Gibbs & Bruns, LLP likewise oppose the relief sought by the Task Force and will be filing a separate pleading to that effect shortly. Because of the need to file this opposition within five days of the Task Force's motion, the Officer Defendants have not yet been able to determine whether other Insured Defendants who joined in Certain Insured Defendants' Opposition to Enron Task Force's Second Motion to Stay Depositions and Request for Expedited Consideration ("Opposition to Task Force's Second Motion") will be joining in this opposition. If appropriate, the Officer Defendants will notify the Court of any additional parties who join this motion.

[2] The Officer Defendants incorporate the arguments in Certain Officers' Opposition to Enron Task Force's Motion and Memorandum of Law for a Limited Stay of Selected Depositions ("Officers' Opposition") and the Opposition to Task Force's Second Motion.

thus far belie the Task Force's vague claim that it will suffer some prejudice from the discovery of evidence in this civil case. The record to date also demonstrates that the Task Force will oppose the deposition of any witness from Enron, Arthur Andersen's Enron team, or the lead plaintiff in this case.

> In its June 1, 2004 Order this Court recognized three concerns raised by the Task Force:
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> [T]he Task force maintains that the taking of these depositions will (1) unduly risk disruption of the criminal prosecutions; (2) raise the danger of disclosing sensitive information from the ongoing grand jury investigation; and (3) accord to the defendants in the criminal cases, who are also defendants in the putative class action cases, discovery to which they would not be entitled under the rules and procedures governing criminal cases.

(Order on United States' Motion and Memorandum of Law in Support of Its Request To Intervene and for a Limited Stay of Selected Depositions ("6/1/04 Order") at 2). The Court noted in its June 1, 2004, Order that scheduling could be worked out to avoid disruption of the criminal trials and the Task Force has not disputed that. Thus, the Task Force's first concern was satisfied. The Court also included a provision in that order that the civil discovery could not inquire about grand jury testimony, expected criminal trial testimony, or meetings with the government. So, the Task Force's second concern was also satisfied. The Court then noted that the Task Force's third concern, that criminal defendants might obtain discovery they would not get in the criminal case, "may not be avoidable," but also noted, "[I]t is well to remember that the Discovery Protocol Order was not negotiated in order to provide an end-run around criminal procedure rules." (6/1/04 Order at 3). As

defendants explained in their prior brief, this case is not like the cases relied upon by the Task Force. Most of the defendants in this case are not criminal defendants, they did not bring this case, and they moved to have it dismissed before discovery commenced. (Opposition to Task Force's Second Motion at 4-5). The Task Force cannot contest those facts which put to rest any claim that this case is a sham to evade the criminal discovery rules.

This leaves the Task Force to argue only that it will suffer some undefined prejudice from the depositions at issue. But despite now having had three opportunities to do so, the Department of Justice has still not explained how the search for truth in the criminal cases will be impaired by depositions in this case. To the contrary, the two depositions taken over the Task Force's objection demonstrate that the witnesses were unlikely to be called by the Task Force in any criminal case and that the Task Force has suffered and will suffer no prejudice from this civil discovery. The legitimate desire of the plaintiffs, the defendants (most of whom are not charged with any crime) and this Court to conclude this case expeditiously cannot be outweighed by an undefined, unstated, and unsupported claim of prejudice to the Enron Task Force.

2. The Task Force's Third Motion to Stay Should be Denied.

a. The Indefinite Stay for an Unidentified Group of Witnesses Will Destroy This Court's Schedule.

i. The Task Force Seeks an Indefinite Stay.

In its June 1, 2004 Order, this Court recognized, "[t]he stay sought by the Task Force would seem to be one of infinite duration." (6/1/04 Order at 1). The Task Force continues to argue that this is not the case[3], but the Task Force continues to request a stay "until these specific witnesses

[3] Task Force's Third Motion at 7 ("Contrary to the parties' assertion that the government is seeking a delay of 'infinite duration' . . .").

have concluded their testimony in the Criminal Cases." (Task Force's Third Motion at 3). The Task Force defines "Criminal Cases" to include not only the Bayly case, the Rice case, and the Skilling case (that has yet to see even its first trial setting), but also other cases "related to the United States' investigation of the collapse of Enron Corp." (Task Forces Third Motion at 2). The Task Force admits that its investigation is "ongoing and is examining other acts and individuals" some of whom are "not yet charged." (Task Force's Third Motion at 2 and 6). Thus the Task Force seeks to stay depositions until the conclusion of trials in cases it has not yet even initiated. Even if indictments in those unnamed cases were issued today, those cases likely could not be tried before the end of the discovery period in this case. The Task Force's stay is indeed one of "infinite duration."[4] The "extremely tight" schedule in this case (6/1/04 Order at 2) cannot accommodate any delay of these central depositions, let alone one of undefined duration as requested by the Task Force.

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[4]While the Task Force seeks to delay most of the depositions to which it has objected until after all of the Criminal Cases are tried, it hints that it might seek to delay the three at issue in its third motion only until the conclusion of the trial of the Rice case. The Task Force states in a footnote that "once these individuals have completed their testimony in the Rice matter, which the government *anticipates* will conclude in the Fall of 2004, *it is unlikely* that the United States will seek to further stay their depositions in this case." (Task Force's Third Motion at 3 n.4 (emphasis supplied)). The original defendants in the Rice case were first set for trial in June of last year, but that case will now go to trial in October of this year, at the earliest. Recently the trial in the Bayly case was reset on the day it was supposed to begin and the Task Force superseded the indictment in that case again just last week. The Task Force cannot assure the Court that the trial in the Rice case will begin this Fall and even if it begins as scheduled in October, it may not conclude until sometime after the first of next year. And even after that trial is completed, the Task Force only states that "it is unlikely" that it will seek a further stay. This Court's "extremely tight" schedule cannot accommodate even the delay envisioned by the Task Force's most optimistic scenario.

ii. The Task Force Seeks to Stay Critical Depositions of Former Officers of Enron, Arthur Andersen's Enron Engagement Team, and the Lead Plaintiff.

Despite repeated requests, the Task Force has refused to provide a list of the witnesses whose depositions it seeks to indefinitely postpone. The Task Force has now sought to stay eleven depositions in this case, including the depositions of witnesses who worked in the Enron business units at the heart of the plaintiffs' allegations in this case, the members of Arthur Andersen's Enron Engagement Team, and the Lead Plaintiff. This is not a case of tangential witnesses being postponed until later in the discovery period. The Task Force is attempting to delay indefinitely the depositions of some of the most critical witnesses in this case.[5] The testimony being prevented by the Task Force's objections is not only critical to the defense of this case, it is also critical to the identification of other important witnesses. As explained in the Insured Defendants' prior brief, these witnesses' testimony will provide the jumping off point for a series of sequenced discovery that will follow up on, amplify, and explore the issues identified by these crucial early witnesses. (Opposition to Task Force's Second Motion at 9). The ambitious schedule the parties and the Court have in this case cannot be met if the parties are denied timely access to critical witnesses.

(1) John Bloomer and Bill Collins

In its current motion, the Task Force seeks to delay the depositions of two former senior Enron Broadband Services officers, John Bloomer and Bill Collins. The Task Force argues that

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[5]The Task Force points out that "it is no longer seeking to stay the deposition of Gary Peng or Margaret Ceconi." (Task Force's Third Motion at 2). The Task Force apparently allowed Mr. Peng to be deposed because he had already given testimony to the Enron Bankruptcy Examiner and that testimony has been produced in this case. Ms. Ceconi is reportedly out of the country, so obtaining her testimony in the civil case will be difficult and it appears unlikely that she will be testifying in any criminal trials anytime soon.

these witnesses will give testimony regarding "the circumstances surrounding this unit's failed development." (Task Force's Third Motion at 4). Messrs. Collins and Bloomer are two of the most relevant witnesses on the technical feasibility of EBS's business plan. Their depositions are essential to identifying witnesses and topics for further discovery.

(2) Arild Holm

The third witness the Task Force seeks to delay is Arild Holm, a former investment analyst for lead plaintiff, the Regents of the University of California. (Task Force's Third Motion at 4). Mr. Holm may be the most important representative of the plaintiff in this case. While Mr. Holm is critical to this case because, *inter alia*, he was employed by the lead plaintiff, he is only one of many analysts who examined Enron and EBS. It is likely that Arild Holm has never even met Mr. Rice or any of the other defendants in the Rice case. It is difficult to imagine how one of many analysts who had little or no contact with the defendants could "figure prominently in the Rice trial" or why any witness who will supposedly "figure prominently" in the Rice trial. Whatever role Arild Holm might have in the Rice trial could not be sufficient to outweigh the civil defendants' right to depose a former employee of the lead plaintiff that is accusing them of fraud.

b. Contrary to the Task Force's Alleged Fears, the Depositions Have Not Unfairly Prejudiced the Task Force.

In its First Motion for Stay the Task Force sought to stay, among others, the depositions of Ronald Hulme and Claudia Johnson. The Task Force argued that "all three witnesses [Ronald Hulme, Claudia Johnson, and Roger Willard[6]] have testified before the Enron Grand Jury. The United States expects to call all three to testify in the Rice matter and at least one, if not more, to

[6]Mr. Willard is scheduled to be deposed on July 19, 2004.

testify in the Skilling trial once it is scheduled." (Task Force's First Motion at 5). The Task force warned of dire consequences if these depositions were allowed to proceed. "If these depositions are permitted to take place it will undermine the Government's position in the Criminal Cases and the criminal discovery process in those matters. Through these depositions the witnesses will be questioned regarding their expected testimony in the Criminal Cases and about meetings with the government and their testimony before the Enron Grand Jury, information the criminal defendants cannot obtain through the criminal discovery rules. . . . Such discovery could seriously impede, impair, and prejudice the criminal prosecution and related investigation." (Task Force's First Motion at 5-6). Ronald Hulme was deposed on June 3 and 4, 2004, and Ms. Johnson was deposed on June 22, 2004. None of the Task Force's dire predictions came to pass. To the contrary, the depositions raise serious questions regarding whether the Task Force even intended to call either witness at any criminal trial.

i. The Depositions Did Not Reveal Expected Criminal or Grand Jury Testimony or Meetings with the Government.

The Task Force had warned that "the witnesses will be questioned regarding their expected testimony in the Criminal Cases and about meetings with the government and their testimony before the Enron Grand Jury." As this Court will recall, the defendants stated in their briefs opposing the Task Force's motion for stay that they would not ask about expected criminal trial testimony, grand jury testimony, or meetings with the government. This Court also entered an order prohibiting such

questioning. (6/1/04 Order at 4).[7] The parties complied with the Court's order and the Task Force suffered no prejudice.

ii. The Depositions Demonstrate that the Discovery in the Civil Case Has Not Interfered with any Prosecution Witnesses.

The Task Force argued in its first motion that it "expects to call all three [Ronald Hulme, Claudia Johnson, and Roger Willard] to testify in the Rice matter and at least one, if not more, to testify in the Skilling trial once it is scheduled." (Task Force's First Motion at 5). The Task Force never identified how deposing these witnesses would "interfere" with their testifying in any criminal cases and, in fact, there is no reason to believe that any civil deposition would cause any such interference. But in this case, there has not been any interference with any prosecution witness for an additional reason - - Ms. Johnson and Mr. Hulme's testimony demonstrates that neither of them was likely to be called by the prosecution at any criminal trial.

(1) Claudia Johnson's Testimony Does Not Support the Task Force's Allegations.

Claudia Johnson was a Vice President of Public Relations for Enron Broadband Services and was involved in coordinating the issuance of press releases that the Task Force and the Plaintiffs claim were issued by Enron executives with intent to defraud. But Ms. Johnson testified that for each press release, "in order for me and my team to feel comfortable with the release before we sent it to the executives we would walk it through the technicians – . . . – and the product development individuals so that I was accurate and not embarrassing myself, you know, that these were definitely

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[7]In its Second Motion the Task Force argued that the Court's order prohibited asking the witness about any topic that might also be the subject of the witness's anticipated trial testimony. (Task Force's Second Motion at 7-8). The Task Force no longer appears to be pressing its strained reading of this Court's order. (Task Force's Third Motion at 8-9 ("This distinction [between the Task Force's reading and the defendants'] - if there is one at all - is of no moment.")).

how the words should be drafted." (Johnson Tr. (excerpts attached as Ex. 1) at 107-08). Before she sent a press release to Enron corporate for approval she made sure, "with help from [her] technology support" that "everyone in Enron Broadband Services [was] comfortable with it." (Johnson Tr. 36). Ms. Johnson also dispelled any possibility that the final press releases were inaccurate or not in accordance with the understanding of EBS's technical staff. "Do you recall anyone bringing to your attention – . . . – any mistakes or inaccuracies [in any final issue press releases]? No." (Johnson Tr. 90). Ms. Johnson also testified to broad circulation of press releases within Enron Broadband Services and the broad consensus on their contents. (*See, e.g.*, Ex. 50086 (attached as Ex. 2) and Johnson Tr. 154 ("Did anyone [of the scores of ECI[8]] employees state that any of these releases were false or misleading? No."). Specifically with reference to two of the press releases that the government contends were fraudulent, Ms. Johnson did not recall any disagreement within Enron regarding those press releases. (Johnson Tr. 136). With regard to the now-famous 2000 analyst conference, Ms. Johnson said that no one said anything that she believed to be inaccurate, false, or misleading. (Johnson Tr. 212). Ms. Johnson could not recall "anyone at any meeting [of the people she worked with] suggesting that any public statements issued by Enron were false" or that "the company's network was not functioning in a manner consistent with its public statements." (Johnson Tr. 216-17). Ms. Johnson said that in the time she was at Enron she did not perceive any conduct that she believed to be fraudulent or criminal. (Johnson Tr. 222).

Ms. Johnson testified to no wrongdoing of any kind by any defendant. It is difficult to see any purpose for which the Task Force could have expected to call her in any criminal trial.

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[8]ECI was a precursor to EBS.

(2) Ronald Hulme's Testimony Does Not Support the Task Force's Allegations.

Ronald Hulme is a consultant at McKinsey & Company who worked on analyses of Enron Broadband Services. Mr. Hulme testified to McKinsey's access to Enron, which included attending a board meeting and having access to management, mid-level, and lower-level Enron employees. He also testified to the multiple McKinsey teams that worked on Enron engagements. (Hulme Tr. (excerpts attached as Ex. 3) 20-21, and 36). Mr. Hulme's testimony could not support any allegation of fraudulent or criminal conduct. The closest Mr. Hulme came to any allegation of wrongdoing was to say that at times some people within Enron Broadband Services were more optimistic about the company's prospects than he was. When asked about some challenges Mr. Hulme felt EBS faced and his discussion of them with Mr. Rice, Mr. Hulme testified to Mr. Rice's sincere optimism borne of overcoming similar challenges in the past.

Q. And although there clearly was a disagreement between you, on behalf of McKinsey, and Mr. Rice, did you believe it to be an honest disagreement?

A. I wouldn't even have described it as a disagreement at the time.

* * *

A. He did not factually disagree.

Q. Did he disagree on the consequences of what you were pointing out?

A. **He was simply optimistic.** I recall him expressing the view that these were minor problems; we've been through more difficult things before, and, therefore, this is normal, and we'll persevere.

Q. When the gas marketing business was first developed, were there problems getting it off the ground?

A. I wasn't present for much of that time, but I believe that there were. And **I believe it was his impression that this was similar to those types of experiences.**

Q. Mr. Rice had lived through those battles in the gas arena, right?

A. Yes, he had.

Q. When the electric power business, the trading business was first developed, there were challenges at initiation?

A. I believe there were.

Q. And had Mr. Rice lived through those challenges, as well?

A. I think he had.

(Hulme Tr. 147-49 (emphasis supplied)). Mr. Hulme said that he "had no thought at the time that there was anything that was not honest about the reaction" he received from Mr. Rice and the rest of Enron's people. (Hulme Tr. 159-60). Despite all he has heard since that time, he is of the same view today.

Q. Sitting here today, do you have any evidence that any of the Enron officers were somehow engaged in fraudulent or criminal behavior with respect to Enron Broadband?

[objection omitted]

A. I – I do not.

(Hulme Tr. 162).

Like Ms. Johnson's, Mr. Hulme's testimony could not support any allegation of any crime. One hopes that the Task Force has just been overbroad in designating witnesses to be covered by its requested stay, because it would be disturbing to conclude that the Task Force is trying to prevent, or even delay any defendant, criminal or civil, from discovering exculpatory evidence in any case.

In any event, whatever interest the Task Force could possibly have in delaying the testimony of such witnesses, it could not possibly outweigh the interest that the defendants in this case, most of whom are not even accused in any criminal case, have in discovering this critical testimony in a timely fashion.

(3) There is No Danger of Witness Intimidation or Perjured Testimony.

The Task Force acknowledges that "the concerns that usually merit a stay" are "perjured testimony and witness intimidation." (Task Force's Third Motion at 8 n.7).[9] The Task Force also acknowledges that "the government does not contend that such actions have taken place." (Task Force's Third Motion at 8 n.7). However, the Task Force argues that "the danger of such activities is never removed from a criminal matter such as this where the defendants, if convicted, stand to receive significant periods of incarceration and to incur substantial financial penalties." (Task Force's Third Motion at 8 n.7). The criminal case at issue here does not involve drug dealers or mobsters. Neither of the witnesses deposed to date were intimidated and neither of them perjured themselves and the Task Force knows that none of the defendants and none of the counsel in either case will be intimidating any witnesses or suborning any perjury. If the Task Force wants to derail the discovery in this case, it should come forward with more than unfounded speculation about improper conduct that it admits has never happened in any Enron-related case.

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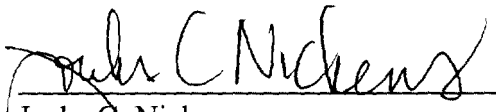
[9]The Task Force previously argued that it could suffer from some sort of unfair surprise (Task Force's First Motion at 16), but it has apparently abandoned this claim in light of the Insured Defendants' offer to allow them to have transcripts of the depositions. (Opposition to Second Motion at 6 n.5). The Task Force also pointed to the danger that witnesses' identities would be revealed (Task Force's First Motion at 16), but it has apparently also abandoned that argument, since the identities of the persons involved is generally known to all involved. (Opposition to Second Motion at 6).

3. Conclusion

A stay in this case is not appropriate. Unlike in the cases cited by the Task Force, there can be no serious claim that this case brought *against* the defendants, most of whom are not criminal defendants, is a sham to obtain criminal discovery. Unlike in the cases relied upon by the Task Force, this is not a case where there is any danger of witness intimidation or perjury. Most importantly, unlike in the cases cited by the Task Force, and more so than almost any other case, this is a large case on an ambitious and "extremely tight" schedule. The now-disproved claims of some undefined prejudice to the Task Force cannot justify throwing the discovery in this case into a "cocked hat."

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was served by electronic posting to www.ESL3624.com on July 13, 2004.

Paul D. Flack

Paul D. Flack